RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 10-1171

In the Supreme Court of the United States

LINDA A. THOMAS,

Petitioner,

v.

STATE OF LOUISIANA,
DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State candidly recognizes that the issue presented in the petition warrants this Court's review: "petitioner correctly notes a profound circuit split about the meaning of *Heck v. Humphrey*." Opp. 3. On that, the State surely is correct. As we showed in the petition, the courts of appeals are deeply divided on whether to recognize an exception to *Heck*'s favorable-termination requirement, a frequently recurring issue of great practical importance.

The State also appears to recognize that the issue is squarely presented in this case and was decided below by the court of appeals. It hardly could contend otherwise: the State itself urged the Fifth Circuit to apply the *Heck* rule (see Br. of Appellee, at 15, No. 10-30607 (5th Cir.)), and the court disposed of the case by holding squarely that *Heck*'s "favorable termination rule bars [petitioner's] state law false imprisonment and false arrest claims" because "this circuit applies the favorable termination rule even when the plaintiff is no longer in custody." Pet. App. 14a, 15a.[1]

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[1] The State contends that the "application of *Heck* to state-law claims appears to reflect a minority approach" among the courts (Opp. 2 & n.1), but does not suggest that this is a basis to deny certiorari. And for good reason: the Fifth Circuit accepted the State's submission that *Heck* controlled this case, finding that petitioner's failure to object "waived any argument that her state-law claims should be addressed apart from *Heck*." Pet. App. 14a n.4 (quotation & alteration omitted). The State does not suggest that the application of *Heck* differs in any respect in cases presenting state and federal claims that would call into question the validity of a conviction. Thus, whether *Heck* contains an impossibility exception is a question squarely before this Court here.

But the State – even while agreeing that the Court should resolve the issue presented here "soon" (Opp. 18) – urges the Court nevertheless to deny review in this case, for two reasons. It contends, first, that petitioner could not prevail under state law even if the *Heck* rule did not apply to her case. Opp. 4-7. And it maintains that petitioner could not benefit from an impossibility exception to *Heck*, even if such an exception were recognized, because she did not appeal her conviction through the state appellate process. Opp. 9-13. Neither of those contentions, however, provides a ground for denying review.

A. State Law Does Not Bar This Suit.

The State's principal contention is that the Court need not decide the *Heck* issue in this case because, wholly apart from the *Heck* rule, petitioner's claims are barred by state law; the State maintains that petitioner may not challenge her false arrest or false imprisonment without first having her conviction set aside in state court. Opp. 5-6. But the fact of the matter is that the court below expressly considered and decided the *Heck* question – and evidently regarded it as imperative that the issue be resolved. The *Heck* question was the only one (having to do with the issue now before the Court) that the Fifth Circuit decided in the text of its decision. And the court of appeals addressed the *Heck* point at length, making it the express basis for its holding. Pet. App. 13a-15a. The court thus took pains to observe that, although "several other circuits do not apply *Heck*'s favorable termination rule when the plaintiff is no longer in custody" and this "Court has suggested that this issue is unsettled," it nevertheless would reaffirm and apply its contrary rule. *Id.* at 15a n.5.

To be sure, the Fifth Circuit also opined, alternatively, that the judgment against petitioner "was still proper" even if *Heck* does not govern here because, under state law, petitioner's conviction of "the crime for which she was arrested and imprisoned" bars recovery for false arrest or false imprisonment. Pet. App. 14a n.4. But there is reason to doubt that this was a definitive, or correct, resolution of that state-law issue. The state-law question received scant attention below: it was the subject of a single sentence in the State's Fifth Circuit brief, and the State did not cite a single authority in support of its position. See Br. of Appellee, at 15, No. 10-30607 (5th Cir.). It was not addressed by petitioner at all in her pro se pleadings. It was wholly ignored by the district court. And it was addressed only in the second paragraph of a footnote by the court of appeals. Pet. App. 14a n.4. The State, meanwhile, recognizes that the laws of other states apply different rules. Opp. 5 n.2. And it is not at all apparent that Louisiana courts in fact apply the rule that the State now treats as dispositive in its brief.[2]

In such circumstances, the presence of this state-law issue in the background should not preclude re-

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[2] The Fifth Circuit cited two decisions for the proposition that the person convicted of a crime may not state a claim for false arrest or false imprisonment. The first, *Harrison* v. *State Through Department of Public Safety & Corrections*, 721 So. 2d 458 (La. 1998), manifestly stands for no such proposition. There, the Louisiana Supreme Court addressed the legality of the plaintiffs' arrests in the course of resolving their tort claims (see *id.* at 464), which is precisely what petitioner seeks in her state-law suit. The second decision cited by the Fifth Circuit, *Restrepo* v. *Fortunato*, 556 So. 2d 1362, 1362 (La. Ct. App. 1990), is a 20-year-old intermediate appellate decision that long predates *Harrison* and contains no analysis at all.

view now of the federal question decided below and presented in the petition. Even when an alternative basis for rejecting the petitioner's claim is suggested, this Court is "more likely to take a case if the issue in conflict is the principal one and the alternative ground for decision [below] an incidental one." E. Gressman, et al., SUPREME COURT PRACTICE 248 (9th ed. 2007). That certainly describes this case, where the application of *Heck* undeniably was the principal issue resolved by the court of appeals. In such a setting, it would be appropriate for the Court to grant review, decide the important federal question regarding the meaning of *Heck*, and (if petitioner prevails on that question) remand the case for definitive resolution of the remaining state-law issues now pressed by the State. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 129 S. Ct. 788, 798 (2009).

B. The Impossibility Exception Applies To Petitioner.

The State next contends that the impossibility exception to *Heck* would not apply to petitioner even if the Court recognized such an exception, as she did not appeal her conviction or seek habeas in *state* court. Opp. 7-13. This is incorrect. The focus of the impossibility exception is whether the claimant has recourse to *federal* habeas. Here, there can be no dispute that petitioner's short period of incarceration and probation rendered federal habeas unavailable, and thus the impossibility exception to *Heck* should come into play.

The impossibility exception contains no requirement that a claimant first seek relief in state court. The purpose of the doctrine is to guarantee that all individuals have access to a federal forum. See *Powers* v. *Hamilton County Pub. Defender Comm'n*, 501

F.3d 592, 603 (6th Cir. 2007) ("[T]he favorable-termination requirement could not be deployed to foreclose federal review of asserted deprivations of federal rights by habeas-ineligible plaintiffs."); *Harden* v. *Pataki*, 320 F.3d 1289, 1299 (11th Cir. 2003) ("[B]ecause federal habeas corpus is not available to a person extradited in violation of his or her federally protected rights, even where the extradition itself was illegal, [Section] 1983 must be."). Accordingly, to the extent that a claimant's diligence is relevant to the impossibility exception, it is limited to the question whether a claimant had the opportunity to seek *federal* habeas, but declined to exercise the option.

Here, petitioner had no realistic recourse to *federal* court via habeas. That is because such a federal action would have required her to (1) exhaust state remedies and (2) file a federal habeas petition during the period of time when she was in custody. See 28 U.S.C. § 2254(b)(1). She could not have done so in the circumstances of this case.

Exhaustion requires presenting every claim to every available state court, including the highest state court by a petition for discretionary review. See *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 845 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."); *Whitehead* v. *Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) ("The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court."). As a practical matter, that means that, to obtain relief via federal habeas, petitioner would have had to complete all of the following within one year:

- File post-trial motions in the trial court;
- Wait for the trial court to resolve those motions;
- Appeal to, brief, and argue the issue before the intermediate state court of appeal;
- Wait for the intermediate court of appeal to adjudicate the dispute;
- Apply for a discretionary appeal to the Louisiana Supreme Court;
- Wait for the decision of the state supreme court with respect to the discretionary appeal; and
- If the appeal is granted, brief and argue the case before the court and then obtain a decision.

Petitioner could not have completed this process in one year.

And that is precisely how the lower courts have applied the impossibility exception. In *Wilson* v. *Johnson*, 535 F.3d 262, 268 (4th Cir. 2008), for example, the plaintiff was sentenced to a twelve-month term, with six months suspended. *Id.* at 263. Thus, the plaintiff there was "in custody" for habeas purposes for a period of at least one year. In such circumstances, the plaintiff successfully argued "that complying with habeas' administrative exhaustion requirement during the additional confinement was impossible." *Id.* at 268 n.8. It is no different here. In other courts, therefore, petitioner would be exempt from *Heck*'s favorable termination requirement.

C. The Court Should Recognize An Impossibility Exception To *Heck*.

Finally, although not offered as a basis for denying review, we briefly note that the State's defense of the merits of the holding below is not well taken.[3] As five Justices have explained at differing points (Pet. 26), *Heck* is best understood as precluding only those actions in federal court that would undermine the federal habeas statute. When federal habeas is unavailable through no fault of the claimant's, a civil

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[3] Despite agreeing "that the courts of appeals are divided" on the question presented (Opp. 7), the State quibbles with our characterization of the circuit conflict. Although not offered as a reason for denying review, we note that the State's contentions in this regard are incorrect.

The Ninth Circuit in *Guerrero* v. *Gates*, 442 F.3d 697, 705 (9th Cir. 2006), did not limit the impossibility exception to challenges to loss of good time credits and the like; the court merely held – as we explained in the petition (Pet. 14-15) – that the exception is available only for those who diligently pursue relief in *federal* court. 442 F.3d at 704-705. This is precisely how courts in the Ninth Circuit have viewed *Guerrero*. See, *e.g.*, *Hawes* v. *Adams*, 2010 WL 2850979, at *1 n.1 (E.D. Cal. 2010); *Beckway* v. *DeShong*, 717 F. Supp. 2d 908, 917 (N.D. Cal. 2010).

Likewise, the Seventh Circuit has made clear that the impossibility exception is available "where *federal* habeas is not available." *DeWalt* v. *Carter*, 224 F.3d 607, 617 (7th Cir. 2000) (emphasis added). *Hoard* v. *Reddy*, 175 F.3d 531, 533 (7th Cir. 1999), on which the State relies, dealt with the unique circumstance where a plaintiff's claim itself turned on unavailability of a state forum as a substantive violation of law. That decision has no bearing on the subsequent decision in *DeWalt*.

Finally, we noted that the Eleventh Circuit has evidenced confusion on this point, which highlights the need for review. Pet. 16. Regardless, *Morrow* v. *Federal Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir. 2010), adopted the impossibility exception as one of two alternative holdings.

action is cognizable for the simple reason that the action does not interfere with the purpose or operation of the habeas statute.

The State's error here is that it fails to account properly for the source of the *Heck* rule. It suggests that the rule derives from common-law limitations on tort actions. Opp. 14-15. But although language in some of this Court's decisions support that understanding, nothing in the statutory text points toward such a limitation, and resort to common law analogs is appropriate only where the question at hand is not resolved on the face of the statutory text. See *Heck* v. *Humphrey*, 512 U.S. 477, 492 (1994) (Souter, J., concurring). Here, the policy of federal habeas, "which applies only to persons in custody," alone shapes the *Heck* favorable termination rule. *Id.* at 497 (quoting *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973)) (quotation and alteration omitted).

For this reason, decisions of this Court following *Heck* confirm that its rule is designed to preserve federal habeas policies. In *Nelson* v. *Campbell*, 541 U.S. 637, 646-647 (2004), the Court explained that the "'favorable termination' requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute." And in *Wilkinson* v. *Dotson*, 544 U.S. 74, 81 (2005), the Court held that *Heck* ensures protection of "habeas' exclusive domain."

The State notes the availability of state fora to overturn state convictions. But the State's argument shows why its position is flawed: it creates a substantial gap in the ability of federal courts to provide

relief for individuals convicted in state court. The position taken by the State and the court below creates the peculiar rule under which a federal forum is available only selectively. There is no basis in law or policy for extending the protections of federal court seemingly at random, denying those protections to persons released early from state custody, and thus achieving what "would be an untoward result." *Heck*, 512 U.S. at 500 (Souter, J., concurring).

As we explained in the petition, the issue presented here is dispositive in a substantial number of cases, but has continued to evade review by this Court. See Pet. 19-24. Indeed, in the seven years since the Court noted in *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004), that the question remains open, we are unaware of *any* case coming to the Court that has cleanly presented the issue. Pet. 22-24 & n.8. This case does. The Court should thus take the opportunity presented by this case to resolve this important question and, if petitioner prevails, remand the case for consideration of the alternative grounds for denying her claims that are advanced by the State.

CONCLUSION

The petition for a writ of certiorari should be granted.